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No.

Supreme Court, U.S.
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IN THE

# Supreme Court Of The United States

October Term, 1995

LLOYD WALKER,

Petitioner,

vs.

THOMAS A. MCLELLAN, JAMES BRODERICK, LOREE MORSE, DAN MURPHY, DON WHITSON, MARNIE COLLINS a/k/a MARNIE CHRISTIANSEN, JIM SZAKMEISTER, KURT CLOW, KAY KONERZA, all in their personal and official capacities.

Respondents.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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## PETITION FOR WRIT OF CERTIORARI

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Lloyd Walker, *pro se*
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Bailey, Colorado 80421
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## QUESTIONS PRESENTED

1. Should the so-called "heightened pleading standard" be a cause for dismissal in the matter of individual immunity of the first pro se pleading as there is no such standard in the Federal Rules of Civil Procedure nor in 42 U.S.C. § 1983 and this federal question has not been settled by this Court?

2. Did the Tenth Circuit Court of Appeals error at law and abuse its discretion in making rulings on issues which were not brought before the Court?

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No.

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October Term, 1995

LLOYD WALKER,

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vs.

THOMAS A. MCLELLAN, *et al.*,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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## PETITION FOR WRIT OF CERTIORARI

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Lloyd R. Walker respectfully petitions for a writ of certiorari to review the judgment of the Tenth District Court of Appeals for the State of Colorado.

## OPINIONS BELOW

Order from the United States Court of Appeals for the Tenth Circuit dated June 5, 1995 is unreported.

## JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its judgment on April 21, 1995. On June 5, 1995, said Court of Appeals denied the Petitioner's petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2106.

## CONSTITUTIONAL PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
*United States Constitution*; ARTICLE IV

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of live, liberty, or property, without due process

of law; nor shall private property be taken for public use without just compensation."
*United States Constitution*; ARTICLE V

"Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of Life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection to the laws. *United States Constitution*; ARTICLE XIV

**STATUTORY PROVISIONS INVOLVED**

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983

**Criminal Impersonation Colorado Revised Statutes (C.R.S.) § 18-5-113 (1)(e)** A person knowingly assumes

a false or fictitious identity or capacity and in such identity or capacity he:
(e) does any other act with intent to unlawfully gain a benefit for himself or another or the injure or defraud another.

## REGULATORY PROVISIONS INVOLVED

**Federal Rules of Civil Procedure (F.R.C.P.) Rule 8(a). General Rules of Pleading. Claims for Relief.** "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded."

**Federal Rules of Civil Procedure (F.R.C.P.) Rule 15(a). Amended and Supplemental Pleadings. Amendments.** "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or

within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

## STATEMENT OF THE CASE

On February 29, 1992, the Defendants were conducting a Warrant Sting operation. Letters were sent to various victims advising them that they were to receive a free pair of athletic shoes and a chance to win a Harley Davidson motorcycle. To collect the offered gift, the victims were to present themselves and the letter along with valid identification. The victims were further advised in the letter that they would become valued customer for a new business.

Petitioner's brother received such a letter, however, as he was unable to go he asked Petitioner to go.

Prior to arresting Petitioner, none of the officers asked Petitioner his name or for valid identification. Petitioner was led through a door and into a room

where he was immediately arrested. There was a video camera which recorded the arrest.

Petitioner was seized and searched, nonetheless, Petitioner stood on the fifth amendment and remained silent with the exception of giving notice to the arresting officers that he did not have to answer any questions. Petitioner cited *Kolender v. Lawson,* 103 S. Ct. 1855 (1983) and *Houston v. Hill,* 482 U.S. 451, 96 L. Ed 2d. 398, 107 S.Ct. 2502. Petitioner was threatened with 10 years in jail as a result of standing on his rights and addressing the Constitution. Petitioner was treated more harshly then others being arrested as can be verified by the video. Petitioner contends that such harsh methods were used because Petitioner informed Defendants of constitutional violations.

After holding, investigating and interrogating Petitioner for approximately 3 hours, some or all of the Respondents realized that they had arrested the wrong

person, at which time Petitioner was re-arrested and charged with a felony of Criminal Impersonation under C.R.S. § 18-5-113(1)(e). All charges against the Petitioner were later dropped.

On February 16, 1994, Petitioner brought an action under U.S.C. 42 § 1983 for civil rights violations. Included with the complaint were the audio recording and transcript of the events leading up to the first false arrest and the video recording made by the police with a transcript.

On March 30, 1994 Petitioner motioned the court to amend his complaint which was denied by the District Court for failure to comply with Local Rule 7.1(A).

On March 29, 1994, Respondent Police Officers filed a MOTION TO DISMISS COMPLAINT based in part on "qualified immunity" citing F.R.C.P. 12(b)(6). On September 28, 1994, the District Court entered an ORDER denying the Respondent Police Officers

MOTION TO DISMISS COMPLAINT and further ORDERED parties and counsel to meet and confer to negotiate a settlement.

On October 10, 1994, a meeting took place in which the Party Respondent Police Officers were not present. During the meeting, Defense Counsel informed Petitioner that the COMPLAINT lacked "any factual information supportive of the claims found in his Complaint".

On October 11, 1994, Petitioner filed a MOTION TO AMEND COMPLAINT.

On October 11, 1994, Respondent Police Officers, by and through Counsel, filed a NOTICE OF APPEAL citing Collateral Order Doctrine, *Mitchell v. Forsythe* 472 U.S. 511, 105 S. Ct. 2806, 2817, 86 L.2d 411 (1985) as grounds.

On April 21, 1995, the Tenth Circuit Court of Appeals entered an order dismissing some or all of

Petitioner's claims. On May 4, 1995, Petitioner filed a petition for rehearing pursuant to F.R.A.P. Rule 40 into the Tenth Circuit Court of Appeals. On June 5, 1995, the Tenth Circuit Court of Appeals denied Petitioner's petition for rehearing. The court of first instance, has jurisdiction of this cause pursuant to 28 U.S.C. §§ 1331, 1343(a).

**REASONS FOR GRANTING THE WRIT**

Petitioner was not allowed to amend his complaint even once. Should the so-called "heightened pleading standard" be a cause for dismissal of the first pro se pleading, as there is no such standard in the Federal Rules of Civil Procedure nor in U.S.C. 42 § 1983 and the matter was unsettled at the time Petitioner filed his complaint?

The "heightened pleading standard" is not to be found within F.R.C.P. Rule 8, nor in the statute, and Petitioner is not an attorney and relies on existing,

available, published rules and statutes. The Tenth Circuit has applied a "heightened pleading standard" of which the average layman would be unaware on one hand, yet on the other hand, the Tenth Circuit has effectively denied Petitioner the opportunity to comply with this "standard" by dismissing Petitioner's claims before he could amend his complaint. In so doing, Petitioner was denied Constitutional "due process" inasmuch as at the time that Petitioner filed his complaint, the "heightened pleading standard" was unsettled, as was indicated in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S.Ct. 1160, 1162 (1993):

> "We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to

> relief". *Leatherman v. Tarrant County Narcotics Unit*, 113 S.Ct. 1160 (1993)
>
> "We thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials". *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S.Ct. 1160, 1162 (1993):

At that time, this Court did not consider the "heightened pleading standard" to be a requirement with respect to individuals. This Court now has an occasion to settle this question in a case which involves individual immunity and the so-called "heightened pleading" requirement.

No harm would have come to Respondents if Petitioner would have been allowed to amend his complaint in an effort to meet the heightened standard and it is well settled that pro se litigants are held to less stringent standards than attorneys. *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652; *Estelle v.*

*Gamble*, 429 U.S. 97 S.Ct. 285, 292, 50 L.Ed.2d 251; *Gillihan v. Shillinger*, 872 F.2d 935, 938 (10th Cir.1989). To dismiss any aspect of this action without giving Petitioner the opportunity to amend is also inconsistent with F.R.C.P. Rule 15 (a):

> "Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." (emphasis added)

When a plaintiff who has the right to amend his complaint, nevertheless petitions court for leave to amend, as Petitioner did, the court should grant the petition. *Zaidi v. Ehrlich*, 732 F.2d 1218 (5th Cir. 1984). In the case at hand, the trial court denied Petitioner's motion to amend for failure to comply with a local rule, even though Petitioner could have amended his complaint "as a

matter of course". F.R.C.P. Rule 15(a). Rule 15 seems clear that amending a complaint is not out of the ordinary.

> "pro se litigants are to be given reasonable opportunity to remedy the defects in their pleadings. See, e.g., *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir.1990); *Jaxon v. Circle K Corp.*, 773 F.2d 1138, 1140 (10th Cir.1985) *Hall v. Bellmon*, 935 F.2d 1006, 1010 n.3 (10th Cir. 1991)

> "Not every fact must be described in specific detail, *Conley v. Gibson*, 355 U.S. at 47, 78 S.Ct at 102-03, and the plaintiff whose factual allegations are close to stating a claim but are missing some important element that may not have occurred to him, should be allowed to amend his complaint, *Reynoldson v. Shillinger*, 907 F.2d 124, 126-27 (10th Cir.1990). *Hall v. Bellmon*, 935 F.2d 1006, 1010 (10th Cir. 1991)

> "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652; *Estelle v. Gamble*, 429 U.S. 97 S.Ct. 285, 292, 50 L.Ed.2d

> 251; *Gillihan v. Shillinger*, 872 F.2d 935, 938 (10th Cir.1989). We believe that this rule means that if the court can reasonably read the pleadings to state a valid claim on which plaintiff should prevail, it should do so despite plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements; *Hall v. Bellmon*, 935 F.2d 1006, 1010 (10th Cir. 1991)

Dismissal is a harsh penalty, and should be imposed only in extreme circumstances. *Ferdick v. Bonzelet*, 963 F2d 1258 (9th Cir. 1992). The circumstances surrounding this matter are not so extreme as to justify dismissal. Contrarily, it would be extreme, indeed, if Walker were NOT allowed to cure the defects in the Complaint. Respondents offered no argument, and indeed there is none to offer, to support the position that Walker should not have been afforded the opportunity to cure the defects by

amending his Complaint before any dismissal of any aspect of this case was considered.

In furtherance of why the writ should be granted the question must be asked: did the Tenth Circuit Court of Appeals error at law and abuse its discretion in making rulings on issues which were not brought before the Court?

The Tenth Circuit Court of Appeals made a ruling on the issue of probable cause in spite of the fact that issue was not brought before it. Respondents failed to identify Petitioner and assumed that he was Kevin. Respondents never at any time asked Petitioner his name, nor did they attempt to identify him in any other way until after they arrested him. Respondents job was to identify the victims of the warrant sting; they failed to exercise due diligence. Considering

the effect that these so-called peace officers had on the lives of those they arrested on February 29, 1992, one would think that it would not be unreasonable to ask a person his name before arresting him, especially if the person is going to be charged with impersonating another. In any event, it has been found that the standard of appellate review of a trial court's grant of a motion for summary judgment is whether the trial court was "legally correct." *Heat & Power Corp. v. Air Prods. & Chems., Inc.*, 320 MD. 584, 591 (1990). When making a determination on summary judgment, a trial court makes no findings of fact. *King v. Bankerd*, 303 Md. 98, 111 (1985). Rather, the court decides whether a genuine issue of material fact exists to prevent the entry of summary judgment. *Beatty v. Trailmaster* Prods., Inc., 330 Md. 726,

737 (1993); Under this standard, therefore, the review of the Tenth Circuit's ruling must be made as a matter of law. Moreover, a Defendant moving for summary judgment has the burden of showing the absence of genuine issues as to any material, fact, and material it lodges must be viewed in light most favorable to the opposing party. F.R.C.P. Rule 56, *Adickes v. S.H.Kress and Company*, 90 S.Ct. 1598

Moreover, the Tenth Circuit made a ruling on the issue of the so-called warrant which was issued for Kevin. This matter was not brought before the Tenth Circuit. On page 5, paragraph 2 of the Tenth Circuit's ORDER AND JUDGMENT, the court stated:

> "The district court did not address the motion to dismiss insofar as it was directed at any claim for plaintiff's arrest on Kevin's outstanding warrant. We choose to

> address the issue". "[P]laintiff failed to show that Defendants were not reasonable in mistaking him for Kevin when they arrested him. Respondents are entitled to dismissal of this claim as well."

Since filing his complaint, Petitioner has learned that the so-called warrant for Kevin was not facially valid as defined by the U.S. Constitution and the Constitution of the State of Colorado. Petitioner's amended complaint would have brought certain issues into the light. There was no oath or affirmation pertaining to the said alleged "warrant" for Kevin Gene Walker, there were no charges, it was not signed by a magistrate or judge, it was issued by a clerk, therefore, it was not a warrant, rather, it falls into the classification of "capias". The validity of the arrest warrant for Kevin Gene Walker is at issue. The Respondents were

not only negligent in failing to determine Walker's identity prior arresting him, they were also negligent in not determining that the "alleged warrant" was not a lawful warrant.

In *Crane v. State of Texas*, 759 F.2d 412 (5th Cir., 1985), plaintiff was arrested for a misdemeanor on the basis of a "capias" issued by the County Clerk's office. The Fifth Circuit held that a misdemeanor arrest is unconstitutional if made on the basis of a capias issued without a finding of probable cause by a neutral and detached magistrate.

The Tenth Circuit made a ruling without viewing all of the evidence which Petitioner presented to the District Court as part of his complaint.

Petitioner presented a video recording of the first arrest to the

district court as part of his complaint and as evidence. The video shows that Petitioner was led through a door, grabbed, bent over and stripped of his property. The Respondents did not identify themselves, nor did they Mirandize Petitioner. Yet, the Tenth Circuit stated that "this matter is not before us". The matters of the warrant and probable cause were not before it and yet The Tenth Circuit chose to rule on those matters. However, it is apparent that the Tenth Circuit did not view the evidence attached to the complaint. This evidence shows very clearly and exactly the actions of the Respondents with respect to the first arrest. This Court must grant this writ if for no other reason than to view all of the evidence. The audio tape attached to the complaint verifies that the police reports upon

which the Tenth Circuit relied to justify dismissal of Petitioner's claims contain lies. This is a material fact which is in dispute. Deliberate misrepresentations preclude immunity. *Robinson v. Maruffi*, 895 F. 2d 649 (10th Cir. 1990); *White v. Frank*, 855 F. 2d 956; (2d Cir. 1988); *Jones v. City of Chicago*, 856 F. 2d 985 (7th Cir. 1988); *Dellums v. Powell*, 660 F.2d 802 (D.C. Cir 1981); *Malley v. Briggs*, 106 S.Ct. 1092.

This case should be left intact as it will finally address the constitutionality or unconstitutionality of "warrant stings".

Apparently, "warrant stings" are becoming popular throughout the country. Warrant stings should be distinguished from other government operated staged arrests, scams and stings. The staged arrest is an investigative technique

designed to detect corruption in the judicial system by fabricating a criminal case, with undercover agents playing the roles of victim, Defendant, and arresting officer. *U.S. v. Archer*, 486 F.2d 670, 676 (2nd Cir. 1973); *Nigrone v. Murtagh*, 46 A.D.2d 343, 362 N.Y.S.2d 513 (1974). The publicized "Operation Greylord" in Chicago, Ill. used this technique to uncover extensive corruption in that city's criminal justice system. See *U.S. v. Murphy*, 768 F.2d 1518 (7th Cir. 1985) (upholding conviction of judge for taking bribes to fix cases). In investigating crime by infiltrating criminal conspiracies or providing a simulated opportunity for persons to engage in crime, prosecutors and their agents often commit acts that would be subject to penal sanctions if committed by private individuals. Since there are no

established guidelines, the courts have become increasingly frustrated at trying to draw lines between permissible and impermissible undercover activities which involve the commission of crimes. See *U.S. v. Archer*, Supra. Government agents performing illegal acts recalls the celebrated and often-quoted dissenting opinion by Justice Brandeis:

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means.... would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

*Olmstead v. United States*, 277 U.S. 438, 485. (1928).

The common thread which binds such scams and stings is the fact that those performing them are either investigating criminal activities, or gathering evidence to prosecute crime. This is not the case with a "warrant sting". Warrant stings generally involve sending fraudulent letters through the mail, offering non-existent gifts for the purpose of luring people into a particular jurisdiction to be arrested. Generally, the victims have a capias attached to them rather than a warrant. Obviously, if a warrant had been issued, the arresting officers would go to the person named and described on the warrant and arrest him in any jurisdiction. In this instant case, the officers did not even have warrants and did not know if

valid warrants even existed as exemplified in statements made.

## CONCLUSION

It is interesting to note that our system of jurisprudence has evolved to this point. When a lone man attempts to seek a remedy, the Court insists that he cross every "t" and dot every "i". The substance becomes irrelevant and procedure becomes the substance. It matters not if he has a legitimate reason for being there. The effect is the same as saying, "There's a heightened pleading standard, but we're not going to let you meet it". The police, on the other hand, have a wide variety of options and immunities. They can commit criminal impersonation, mail fraud, bait and switch scams, with impunity. There are no set rules which govern the police in these matters. In the case at hand,

after performing the "sting", the police continued down the path by lying on the police reports, committing perjury on the stand, submitting false a affidavit to support a warrantless arrest and tampering with evidence. The Tenth Circuit chose to endorse these activities reasoning that Petitioner did not plead properly or by ignoring these facts altogether. Petitioner has not been allowed to amend his pleadings, but evidently, this fact is also irrelevant to the Tenth Circuit. It may be argued that Petitioner should have hired an attorney. Petitioner can not afford to buy justice, however.

> "There have been powerful hydraulic pressures throughout our history that bear heavily on the court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today. Yet if the individual is no longer to be sovereign, if the police can

> pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country." *Terry v. Ohio*, 392 U.S. 39 (1967).

Evidently, our system of jurisprudence has bowed to the forces of the "powerful hydraulic pressures" and given the upper hand to the police without the benefit of a full debate by the people of this country.

This writ should be granted to settle the question of pleading with particularity to pierce the veil of individual immunity and to supervise the decision to dismiss a pro se complaint wherein the plaintiff has not been allowed the opportunity to amend.

WHEREFORE, Petitioner requests that this Court grant this PETITION FOR WRIT

OF CERTIORARI and any other relief that this court deems just and proper.

Dated this 8 day of October, 1995, by:

Lloyd R. Walker
c/o 104 Buckaroo Road 80421
Bailey, Colorado
(303)838-6545

APPENDIX A -- ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED SEPTEMBER 28, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CASE NO. 94-C-393

LLOYD R. WALKER

Plaintiff,

v.

THOMAS A. MCLELLAN, et al.,

Defendants.

Order filed September 28, 1994
JAMES R. MANSPEAKER Clerk

District Court
for the District of Colorado;
Jim R. Carrigan, Judge.

Lloyd R. Walker,
in propria persona.

ORDER

CARRIGAN, J.

Pro se plaintiff Lloyd R. Walker commenced this action against numerous individual defendants pursuant to 42 U.S.C. § 1983 and 1985 and state law, alleging violations of his state and federal rights. Defendants have filed motions to dismiss. Plaintiff has responded by moving to strike the defendants' motions, and by opposing them.

The issues have been briefed and oral argument would not materially facilitate the decision process. Jurisdiction is asserted under 28 U.S.C. § 1331, 1343, and 1367.

## I. BACKGROUND.

Plaintiff has alleged the following facts, which for the purpose of ruling on the pending motions, must be accepted as true: On February 29, 1992, the Fort Collins Police Department (the Department) conducted a "sting" operation to lure individuals with outstanding arrest warrants into the Department's jurisdiction. The individuals were sent letters directing them to bring a photo ID to a "store" in Fort Collins for a free pair of athletic shoes and a chance to win a Harley Davidson motorcycle.

Plaintiff's brother, Kevin Walker, received such a letter, but was unable to go to Fort Collins, so the plaintiff went in his place. Plaintiff presented a "store employee" with a photocopy of his brother's Anheuser Busch photo ID. Thereafter, the plaintiff was led to a

back room, where he was arrested and allegedly assaulted.

After three hours of interrogation, the officers discovered that they had arrested a man for whom there was no outstanding warrant. They did not release him, however; rather, they charged him with criminal impersonation and arrested him again. Plaintiff was incarcerated from Saturday until Monday, when he posted a $5000 bond.

## II. MOTION TO STRIKE

Plaintiff has moved to strike the defendants' motions to dismiss pursuant to Fed. R. Civ. P 12(f). Rule 12(f) provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." (Emphasis added.) Motions to

dismiss are not included within the definition of a "pleading" under Fed. R. Civ. P. 7(a). Thus, the plaintiff's motion to strike the defendants' motions must be denied.

## III. MOTIONS TO DISMISS.

Defendants Charles L. Robles, John L. Davis, and Albert D. Bloom (the District Attorney defendants) have moved to dismiss the complaint on the ground that it fails to state a claim against them.

Because the plaintiff pursues his claims pro se, the complaint must be construed liberally. Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991). Dismissal of a claim is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle

him to relief. Conley v. Gibson, 355 U.S. 41 (1957).

Plaintiff seeks to impose liability on the District Attorney defendants solely for allegedly conspiring with the other defendants to violate his civil rights. (See Comp. Para. 6, 9.)[1] However, he has failed to allege specific facts showing their agreement and concerted action. Conclusory allegations of conspiracy are insufficient to state valid claims under 42 U.S.C. § 1983 and 1985. Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989) (§ 1983); see Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979) (§ 1985). Thus, I find and

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[1] Plaintiff has acknowledged that the District Attorney defendants were not present when he allegedly was assaulted and falsely arested. Personal participation is an essential element of a subsection 1983 claim. Bennett v. Passic, 545 F.2d 1260, 1262-63 (10th Cir. 1976).

conclude that the complaint fails to state a claim against the District Attorney defendants. Their motion to dismiss will be granted.

Defendants Thomas McLellan, James Broderick, Loree Morse, Dan Murphy, Marnie Christensen, Don Whitson, Jim Szakmeister, Kurt Clow, Kay Konerza, and Fred Rainguet also have moved to dismiss the complaint.[2]

First, these defendants contend that the complaint fails to state a claim under 42 U.S.C. § 1983. Specifically, they argue that it does not assert causation between their alleged conduct and the plaintiff's claimed deprivation of federal rights.

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[2] The complaint asserts that these defendants, at all relevant times, were "law enforcement or detention officers and Officers of the City of Fort Collins and/or . . . Larimer County, Colorado." (Comp. para.5.)

The plain language of § 1983 requires that causation be established before liability can attach;[3] thus, causation is a "necessary element" of any § 1983 claim. Lee v. Town of Estes Park, Colo., 820 F.2d 1112, 1116 n.3 (10th Cir. 1987); see also City of Oklahoma City v. Tuttle, 471 U.S. 808, 818 (1985) (noting that § 1983 only imposes liability for deprivations caused by a particular defendant).

The complaint alleges that the arresting officers, under color of state law, threatened and assaulted the plaintiff, using excessive force.

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[3] Section 1983 provides, in pertinent part:

> Every person who, under color of [state law], subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any [federal] rights, . . . shall be liable to the party injured . . . .

(Emphasis added.)

(Comp. Para. 31, 49.) It alleges that the defendants acted knowingly, intentionally, and maliciously, with deliberate indifference for the plaintiffs' federal constitutional rights. (Comp. Para. 47,48, 51.) Finally, it states that "[a]s a result of the actions and/or inactions of the Defendants, Plaintiff's constitutionally protected rights have been violated [and] Plaintiff has undergone physical damage [and] mental anguish." (Comp. Para. 52, 53.)

I find and conclude that the plaintiff has sufficiently alleged all the elements necessary to state a claim under 42 U.S.C. § 1983, including causation.[4]

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[4] As stated, personal participation is an essential element of a § 1983 claim. See supra note 1. Construing the complaint liberally, as I must, I find that it alleges

Second, the defendants contend that any state law claim the plaintiff might allege is barred by the Colorado Governmental Immunity Act, Colo. Rev. Stat. § 24-10-101 et seq. The Colorado Governmental Immunity Act provides that public employees are immune from tort liability, "unless the act or omission causing . . . injury was willful and wanton." Plaintiff has alleged that the defendants' acts were "performed knowingly, intentionally, and maliciously, with deliberate indifference" (Comp. Para. 47) and that the defendants "deliberately and willfully chose to violate clearly

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personal participation on the part of all of the defendants except the District Attorney defendants. To prevail aganst each of the remaining defendants at trial, however, the plaintiff will have to extablish personal participation by admissible evidence of that particular defendant's actions.

established federal law." (Comp. Para. 51.) Thus, I find and conclude that the defendants are not entitled to the protection of the Colorado Governmental Immunity Act. Compare Computer Sciences Corp. v. Ibarra, 685 F. Supp. 748, 758-59 (D. Colo. 1988).

Third, the defendants argue that the one-year limitation period provided in Col. Rev. Stat. § 13-80-103 (1) (c) bars all of the plaintiff's claims.[5] This section bars the plaintiff's state claims to the extent they are asserted against law enforcement officers acting in their official capacities. See Kliewer v. Sopata, 797 F. Supp. 1569, 1570 (D. Colo. 1992). However, the

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[5] Section 13-80-103 provides a one-year limitation period for all actions against sheriffs, coroners, police officers, firefighters, national guardsmen, or any other law enforcement authority.

Tenth Circuit has held that the two-year limitation period provided in Colorado's residual statute of limitations, Colo. Rev. Stat. § 13-80-102 (1) (i), applies to claims under 42 U.S.C. § 1983. Blake v. Dickason, 997 F.2d 749, 750 (10th Cir. 1993); see also Owens v. Okure, 488 U.S. 235, 249-50 (1989) ("[W]here state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions."). I find and conclude that the plaintiff's federal claims are not barred by the applicable statute of limitations.

Fourth, the defendants assert that the plaintiff cannot assert claims against them in their official capacities, as he apparently seeks to

do.[6] An official-capacity suit is not a suit against the officer personally; the real party in interest is the entity for which the officer is an agent. Kentucky v. Graham, 473 U.S. 159, 166 (1985). A government entity may be liable under § 1983 only when the entity's policy or custom played a part in the alleged violation of federal law. Id.

The complaint alleges that the actions and omissions set forth therein occurred "as a custom and policy of the City of Fort Collins, and the County of Larimer." (Comp. Para. 6.) It further alleges that the defendants used a leased store front operated by the City and County to conduct the sting operation (Comp. Para. 10). I find and

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[6] The complaint's caption indicates that the defendants are being sued "[p]ersonally and [o]fficially."

conclude that the plaintiff, who is proceeding pro se, sufficiently has stated a claim against the entities for which the defendants are agents, namely, the City of Fort Collins and the County of Larimer.

Fifth, the defendants assert that they are entitled to qualified immunity. Government officials generally are shielded from civil liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). A plaintiff opposing dismissal on the basis of qualified immunity has the burden of (1) demonstrating that the constitutional right at issue was clearly established at the time of the defendants' conduct; and (2) coming forward with allegations

sufficient to sustain a conclusion that the defendants violated clearly established law. Sawyer v. County of Creek, 908 F.2d 663, 666 (10th Cir. 1990).

By February 1992, it was well-settled Fourth Amendment doctrine that detained individuals have a right to be free from the use of excessive force by governmental officers. E.g., Culver v. Town of Torrington, Wyo., 930 F.2d 1456, 1459 (10th Cir. 1991). Similarly, it was clearly established that officers violate the Constitution when they make a warrantless arrest without probable cause. E.g., Lusby v. T.G. & Y Stores, Inc. 749 F.2d 1423, 1434 (10th Cir. 1984), aff'd on remand, 796 F.2d 1307 (10th Cir. ), cert. denied, 479 U.S. 884 (1986). Plaintiff has alleged facts that, if proved, support a finding that

his clearly established constitutional rights were violated. Thus, I find and conclude that the defendants are not entitled to qualified immunity

Accordingly IT IS ORDERED that:

(1)Plaintiff's motion to strike the defendants' motions to dismiss is denied;

(2)Defendants' motion to dismiss the complaint is granted as to Robles, Davis, and Bloom; the complaint and action are dismissed as to these three defendants;

(3)Defendants' motion to dismiss the complaint is denied as to the remaining defendants, except to the extent it asserts state claims against law enforcement officers acting in their official capacities; and

(4)The parties and their counsel are ordered to meet and confer within eleven days of this order in a good faith attempt to settle the case without further litigation, expense or delay. The parties shall report to this court in writing within fifteen days of this order, stating the results of the settlement negotiations and whether a conference before a Magistrate Judge or some other alternative dispute resolution proceeding would facilitate settlement.

Dated at Denver, Colorado September 28, 1994.

BY THE COURT:

"s/Jim R. Carrigan"
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE JIM R. CARRIGAN

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the order signed by Judge Carrigan to:

George Hass, Esq.
PO Box 1606
Ft. Collins, CO 80522

Lloyd R. Walker
c/o 104 Buckaroo Rd.
Bailey, CO

"s/Lucy Flis"
Deputy Clerk

Dated: September 28, 1994

Re: 94-C-393

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APPENDIX B -- ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED APRIL 21, 1995

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CASE NO. 94-1494
(D.C. No. 94-C-393)
(D. Colo.)

LLOYD R. WALKER,
Plaintiff - Appellee,

v.

THOMAS A. MCLELLAN, in his official and individual capacity; JAMES BRODERICK, in his official and individual capacity; LOREE MORSE, in her official and individual capacity; DAN MURPHY, in his official and individual capacity; MARNIE COLLINS, also known as Marnie Christiansen, in her official and individual capacity; DON WHITSON, in his official and individual capacity; JIM SZAKMEISTER, in his official and individual capacity; KURT CLOW, in his official and individual capacity; KAY KONERZA, in her official and individual capacity; FRED W. RAINGUET, in his official and individual capacity,
Defendants - Appellants

Filed April 21, 1995 PATRICK FISHER
Clerk

Appeal from the United States District Court for the District of Colorado;
Jim Carrigan, Judge.

Lloyd R. Walker,
in propria persona

## ORDER AND JUDGMENT**

Before ANDERSON, BALDOCK, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. R. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Defendants, several Fort Collins, Colorado, police officers in their individual capacities, appeal from an

** This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

order denying their motion to dismiss, on grounds of qualified immunity, plaintiff's complaint filed under 42 U.S.C. Subsection 1983. We reverse and remand.

The Fort Collins Police Department conducted a sting operation to lure individuals with outstanding arrest warrants into its jurisdiction. The sting involved sending the individuals a letter offering them a free pair of athletic shoes or a $50 gift certificate and a chance to win a motorcycle if they appeared at a certain address on February 28 or 29, 1992. The letter stated that photo identification and the letter were required to claim these items. Further, the offer was nontransferable. Kevin Walker, the brother of plaintiff Lloyd Walker,

received such a letter but was unable to attend and sent plaintiff in his place.

On February 29, 1992, plaintiff and a companion went to the designated address. Plaintiff presented Kevin's promotional letter and a photocopy of Kevin's photo I.D. Defendants arrested him on an outstanding bench warrant for Kevin. When the defendants learned their mistake, they rearrested plaintiff without a warrant for criminal impersonation, Colo. Rev. Stat. Sec. 18-5-113. Following a preliminary hearing, a judge found probable cause to believe plaintiff committed the offense of criminal impersonation. However, the charge eventually was dropped. Plaintiff then commenced the present subsection 1983 action.

Defendants moved to dismiss plaintiff's complaint on grounds of

qualified immunity. Plaintiff filed a response to the motion which contained only legal argument. The district court concluded that plaintiff had alleged facts which, if proved, would support a finding that two clearly established constitutional rights--the right to be free from the use of excessive force by governmental officers and the right to be free from warrantless arrest without probable cause--had been violated. It therefore denied the motion. We have jurisdiction to review its order pursuant to Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

Under qualified immunity, "governmental officials performing discretionary functions, generally are shielded from liability for civil damages insofar as there conduct does not violate clearly established

statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). When a defendant raises qualified immunity, "the burden shifts to the plaintiff to show both facts and law to establish that the defendant is not entitled to a qualified immunity." Workman v. Jordan, 32 F.3d 475, 479 (10th Cir. 1994), cert. denied, 63 U.S.L.W. 3682 and 63 U.S.L.W. 3689 (U.S. Mar. 20, 1995) (further quotations omitted). The plaintiff must first show that the defendant's "alleged conduct violated the law," and then must show that "the law was clearly established when the alleged violation occurred." Cummins v. Campbell, 44 F.3d 847, 850 (10th Cir. 1994) (further quotations omitted). It is insufficient to simply "identify in the abstract a clearly

established right and allege that the defendant has violated it." Romero v. Fay, 45 F.3d 1472, 1475 (10th Cir. 1995). Rather, the plaintiff must articulate with specificity both the constitutional right and the conduct that violated this right. ID. We review de novo the denial of qualified immunity. Bella v. Chamberlain, 24 F.3d 1251, 1254 (10th Cir. 1994), cert. denied 115 S. Ct. 898 (1995).

Police officers making an arrest use excessive force in violation of the Fourth Amendment if their "actions are 'objectively unreasonable' in light of the facts and circumstances confronting them." Graham v. Connor, 490 U.S. 386, 395, 397 (1989). However, plaintiff made no showing that any conduct violated this constitutional right. He never stated what defendants actually

did to him, or which defendants did it. Plaintiff's statement in his appellate brief that defendants assaulted him by leading him through a door without warning, grabbing him, bending him over, and stripping him of his property, is not before us. See Zilkha Energy Co. v. Leighton, 920 F.2d 1520, 1522 n.3 (10th Cir. 1990). The district court erred in denying defendants' motion to dismiss the excessive force claim.

"We analyze the constitutionality of a warrantless arrest under the probable cause standard." Romero, 45 F.3d at 1476. "Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonable trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is

committing an offense." Id. (citations omitted). An arresting officer is entitled to immunity in a subsection 1983 action based on a warrantless arrest if a reasonable officer could have believed probable cause existed to arrest. Id.

Plaintiff failed to make a showing that any conduct violated this constitutional right. The elements of the offense of criminal impersonation are that a person "knowingly assumes a false or fictitious identity or capacity, and in such identity or capacity he: [d]oes any other act with intent to unlawfully gain a benefit for himself or another or to injure or defraud another." Section 18-5-113 (1) (e). Exhibits to plaintiff's complaint demonstrate that plaintiff presented Kevin's promotional letter, which stated

it was not transferable, and a photocopy of Kevin's I.D. to defendants after they told him entry into the store was by invitation only. Further, he stated he wanted the pair of shoes and he tried to win the motorcycle. This is sufficient for defendants to have reasonable believed (sic) that plaintiff committed the offense of criminal impersonation. His contention that he could not have violated the criminal impersonation statue because the promotional scheme was fictitious and it therefore was impossible for him to gain a benefit by assuming Kevin's identity is contrary to judicial construction of the statue. See People v. Borrego, 738 P.2d 59, 60 (Colo. Ct. App. 1987). Thus, we conclude defendants' motion to dismiss the warrantless arrest claim should have been granted.

The district court did not address the motion to dismiss insofar as it was directed at any claim for plaintiff's arrest on Kevin's outstanding warrant. We choose to address the issue. See Laidley v. McClain, 914 F.2d 1396, 1394 (10th Cir. 1990).

A police officer does not violate the constitution if he arrests a person relying in good faith on a facially valid warrant. Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423, 1434 (10th Cir. 1984), vacated on other grounds, 474 U.S. 805 (1985), and cert. denied, 474 U.S. 818 (1985). Plaintiff came forward with no facts in the district court showing the warrant was not facially valid or that defendants did not act in good faith in relying on it.

If police officers have probable cause to arrest one party, the arrest of

a second party is valid if they reasonably mistook the second party for the first party. Hill v. California, 401 U.S. 797, 802 (1971). According to a transcript and the police reports attached to the complaint, plaintiff presented Kevin's promotional letter and a photocopy of Kevin's I.D. to defendants. He filled out a form stating he was Mr. Walker, the address he gave matched the address defendants had for Kevin, and he matched the physical description of Kevin. Plaintiff failed to show that defendants were not reasonable in mistaking him for Kevin when they arrested him. Defendants are entitled to dismissal of this claim as well.

The parties dispute whether plaintiff should be allowed to amend his complaint on remand. He moved to amend

following denial of the motion to dismiss. After the appeal was filed, the district court issued an order granting him twenty days following the date the appeal became final to file an amended complaint. However, this order is null and void since the filing of the notice of appeal divested the district court of jurisdiction to act. Stewart v. Donges, 915 F.2d 572, 575 (10th Cir. 1990).

Although in Sawyer v. County of Creek, 908 F.2d 663, 668 (10th Cir. 1990), in reversing an order denying qualified immunity, we refused to consider the appropriateness of remanding to the district court to allow the plaintiff to file a motion to amend her complaint, this was because she conceded that amending the complaint would be futile absent discovery.

Plaintiff has not made such a concession. We therefore conclude it is appropriate to remand to the district court to address anew the motion to amend. Whether plaintiff's failure to submit a proposed amended complaint should preclude the granting of leave to amend is to be decided by that court. In this regard, however, the district court's attention is directed to Ramirez v. Oklahoma Department of Mental Health, 41 F.3d 584, 596 n.9 (10th Cir. 1994).

The judgment of the United States District Court for the District of Colorado is REVERSED, and the case if REMANDED for further proceedings

consistent with this order and judgment."

Entered for the Court

Wade Brorby
Circuit Judge

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**We have reviewed plaintiff's response to defendants' emergency motion for stay and conclude it does not alter the result.

**APPENDIX C -- ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JUNE 5, 1995**

**UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**
**CASE NO. 94-1494**
**(D.C. No. 94-C-393)**
**(D. Colo.)**

**LLOYD R. WALKER,**
**Plaintiff - Appellee,**
**v.**

**THOMAS A. MCLELLAN, officially and individually; JAMES BRODERICK, officially and individually; LOREE MORSE, officially and individually; DAN MURPHY, officially and individually; MARNIE COLLINS, also known as Marnie Christiansen, officially and individually; DON WHITSON, in his official and individual capacity; JIM SZAKMEISTER, officially and individually; KURT CLOW, officially and individually; KAY KONERZA, officially and individually; FRED W. RAINGUET, officially and individually;**
**Defendants - Appellants**

**Order filed June 5, 1995 by the Clerk of the Court**
**Order from the United States Court of Appeals for the Tenth Circuit; before Anderson, Baldock, and Brorby, Circuit Judges.**

**Lloyd R. Walker,**
**in propria persona.**

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ORDER
Entered June 5, 1995

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Before ANDERSON, BALDOCK, AND BRORBY, Circuit Judges.

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This matter comes on for consideration of appellee's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: "s/Audrey F. Weisel"

No.

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IN THE

# Supreme Court Of The United States

October Term, 1995

LLOYD WALKER,

Petitioner,

vs.

THOMAS A. MCLELLAN, JAMES BRODERICK, LOREE MORSE, DAN MURPHY, DON WHITSON, MARNIE COLLINS a/k/a MARNIE CHRISTIANSEN, JIM SZAKMEISTER, KURT CLOW, KAY KONERZA, all in their personal and official capacities.

Respondents.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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## DELCARATION OF SERVICE

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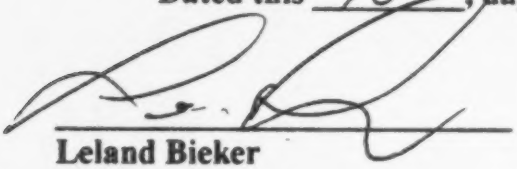
## DECLARATION OF SERVICE

**I, Leland Bieker, pursuant to Rules of the Supreme Court Rules, rule number 29.3 and 29.5, hereby declare that I placed a true and correct copy for each party named herein and three true and correct copies for counsel of record of the Petition For Writ Of Certiorari with the United States Post Office, postage prepaid on this 10 day of October, 1995 addressed to the following:**

**I declare under penalty of perjury that the foregoing is true and correct.**

**Dated this 10 day of October, 1995.**



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